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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AERO VAULT JOHNSTON, LLC, et al., Plaintiffs and Appellants, v. CUSHMAN & WAKEFIELD, INC., et al., Defendants and Respondents.	G051698 (Super. Ct. No. 30-2013-00632262) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert James Moss, Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite, and Nicole M. Catanzarite-Woodward for Plaintiffs and Appellants.

Norton Rose Fulbright, Robert M. Dawson, and Tarifa B. Laddon for Defendants and Respondents.

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This appeal arises out of a series of real estate transactions that have spawned extensive litigation both in the trial court and on appeal. The transactions were "1031 exchanges" — i.e. the use of the proceeds of a property sale to buy "like kind" property, which avoids triggering capital gains taxes on the first sale pursuant to Internal Revenue Code section 1031 (26 U.S.C. § 1031). Plaintiffs contend they were misled about the costs associated with the purchase of the like kind property. They claim the fees and costs exceeded 15 percent — the amount they were ostensibly saving by not paying capital gains taxes — but that defendants employed a sophisticated scheme to make it appear the costs were near 6 percent. In particular, the accountants, attorneys, sellers, brokers and others conspired to set the purchase price of the like kind property at an amount above the price negotiated with the seller of the property, and the premium amount was used to pay hidden costs to various defendants.

The plaintiffs in the underlying litigation are William McCready and Richard Johnston, each of whom created two special purpose entities to facilitate two separate investments. The defendants are legion and include almost every entity in any way associated with the transactions at issue. This appeal concerns only a narrow slice of the overall litigation. The appellants in this appeal are the special purpose entities created by Johnston: Aero Vault Johnston, LLC and Amlap Johnston, LLC. The respondents were the brokers representing LBA Realty Fund-Holding Co. I, LLC (LBA Realty), who sold what was dubbed the "Aero Vault" property to BH & Sons, LLC (BH & Sons) who, in turn, sold tenant in common interests to plaintiffs. This appeal is taken from a dismissal following a demurrer sustained without leave to amend.

We already decided the issues raised in the present appeal in a prior unpublished disposition, *McCready v. CBRE, Inc.* (Feb. 9, 2016, G050316). In relevant part, that appeal concerned the individual plaintiffs' appeal from essentially the exact same order we are now asked to review. We concluded plaintiffs failed to state a cause of action for fraud, fraudulent concealment, negligent misrepresentation, negligence, and

unfair competition (Bus. & Prof. Code, § 17200 (section 17200)) and affirmed the judgment of dismissal in favor of respondents. The only difference in the present appeal is the appellants are the special-purpose entity plaintiffs created by Johnston rather than the individual plaintiffs. That distinction, however, makes no difference to our disposition. In the prior disposition we set out the underlying facts and our rationale for affirming the court's dismissal in some length. Here, in the interests of judicial economy, we repeat only a truncated version of the facts and analysis.

FACTS

The Parties

Johnston invested $1,277,000 to obtain tenant in common (TIC) interests in two different properties, one of which was the "Aero Vault Property" at issue in the present appeal. Johnston took title through two separate special purpose entities, one for each investment: Aero Vault Johnston, LLC and Amlap Johnston, LLC (collectively, the special purpose entities). The special purpose entities are also named as plaintiffs and are the only appellants in the present appeal.

There are 23 defendants named in the operative complaint. The principal actors who created the investment and induced plaintiffs' participation were the accountants, including Allen L. Basso and his firm Smith Linden & Basso, LLP; the real estate brokers Allen *A.* Basso and his firm Lee & Associates Commercial Real Estate Services, Inc. – El Toro; and the attorneys, including Merton Davies, Rosemary Lemmis and the firm Davies Lemmis Raphaely Law Corporation (collectively, the advisor defendants). Also named as defendants were the various sellers of the properties, the sellers' brokers, the title insurance companies, and the escrow companies.[1]

[1] For reasons that are not clear in the record, two entities — Asset Management Consultants, Inc. (AMC) and BH & Sons — that were instrumental in

This appeal does not involve most of the defendants. The respondents to this appeal are Cushman & Wakefield, Inc.; Cushman & Wakefield of California, Inc.; and Cushman & Wakefield of San Diego, Inc. (collectively, Cushman). Cushman was sued as the successor in interest to Burnham Real Estate Services, which acted as the seller's broker in the Aero Vault Property sale.

Key Allegations Concerning Plaintiffs' Investments in the Aero Vault Property

In 2006, some of the defendants (not respondents) convinced plaintiffs to sell real property they owned so the proceeds could be reinvested in various properties, including the Aero Vault Property. The purchase and sale of the Aero Vault Property occurred in two phases. First, the prior owner of the property, LBA Realty, who Cushman's predecessor represented, sold it to BH & Sons (which plaintiffs refer to as a "straw buyer"). Plaintiffs, in turn, purchased TIC interests directly from BH & Sons. The transactions occurred more or less in tandem, with LBA Realty transferring title directly to Aerovault Johnston, LLC, and BH & Sons assigning its contractual rights in the initial purchase and sale agreement to the TIC purchasers, including Aerovault Barrons, LLC.

The purpose of this transaction, in addition to profit, was to defer payment of capital gains taxes owed on plaintiffs' profitable sales of real estate by purchasing a like kind property — i.e., a 1031 exchange. The advisor defendants asserted that the investments would satisfy all of these objectives; they were "tax-advantaged, tax deferred

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organizing and promoting the investments (and directly profited from the fees about which plaintiffs now complain) are not named as parties. Exhibits attached to the complaint identify these companies, and they are sporadically mentioned throughout the complaint. The complaint names a set of unidentified doe defendants as the "promoter defendants," which, in context, appears to include AMC and BH & Sons. But plaintiffs' failure to specifically identify those entities and distinguish the roles they played introduces significant ambiguity and obscures the structure of underlying transactions.

passive investments" that were "suitable, safe, secure and would provide a conservative investment return . . . for [plaintiffs'] long term retirement objectives."

Central to plaintiffs' "decision to invest *or not* in the particular tax-advantaged transaction was whether the up-front costs . . . were true and accurate when balanced against a capital gains tax they sought to defer of 15% . . . ." Had plaintiffs been told the up-front costs of their investments exceeded 15 percent of their cash invested, "they would never have considered" the investments.

Plaintiffs received a document entitled "Explanation of Fees" stating that investors would pay 6 percent of their gross investment in tenant in common properties as a fee at the close of escrow on the investments, as well as several other fixed fees for accounting, escrow, and organizational expenses. The disclosure form (included as an exhibit to the operative complaint) also indicated an annual 1 percent fee would be paid for asset management to BH & Sons. These fees were well under the 15 percent capital gains tax plaintiffs sought to defer by their investments.

But there was a secret additional amount extracted from plaintiffs and the other investors, which resulted in the true up-front costs or "sales loads" exceeding 15 percent of the cash investments. In particular, the purchase and sale agreement between BH & Sons and LBA Realty provided that LBA Realty, the seller, would pay $1.25 million to BH & Sons' broker, AMC. That cost was secretly shifted to plaintiffs however, by marking up the purchase price for the Aero Vault Property from $26,600,000, the price that had been negotiated with the seller of the property, to $27,885,000.[2] In effect, therefore, plaintiffs were paying the fee to AMC, rather than sellers. The actual negotiated price was never disclosed to plaintiffs, and plaintiffs were never told that a portion of the purchase price was in fact a fee being paid by plaintiffs.

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[2] We note that this markup is slightly more than the $1.25 million needed to cover the AMC commission. The complaint does not explain the purpose of the excess.

Plaintiffs allege that their investment in the Aero Vault property is "virtually a total loss because the anchor tenant . . . indicated it will not renew its lease . . . ."

Plaintiffs filed the present lawsuit in February 2013. At issue here is the third amended complaint, in which, as against the respondents in this appeal, plaintiffs alleged causes of action for intentional misrepresentation, negligent misrepresentation, fraud by concealment, negligence (which is duplicative with the negligent misrepresentation claim), and unfair business practices (§ 17200). Plaintiffs also sought an accounting and restitution for unjust enrichment.

Cushman demurred. Initially, Cushman demurred only as to the individual plaintiffs, not the special purpose entities. The reason for this, and the whole reason we have two appeals on essentially the same order rather than one, is plaintiffs' complaint only lists the individual plaintiffs on the caption, but in the body of the complaint lists the special purpose entities as additional plaintiffs. The court sustained the first demurrer without leave to amend, concluding plaintiffs had failed to state a claim because there was no relationship between Cushman and plaintiffs, the statute of limitations had run on plaintiffs' claims, and the claims lacked specificity. Cushman subsequently demurred to the complaint by the special purpose entities. Eight months after the first order, a different judge sustained the second demurrer without leave to amend. We previously affirmed the dismissal of Cushman as to the individual plaintiffs' claims. (*McCready v. CBRE, Inc.*, *supra*, G050316.) We now affirm the dismissal as to the special purpose entities' claims for the same reasons.

DISCUSSION

Much of the parties' briefing focuses on whether plaintiffs' claims are timely under the relevant statutes of limitation, and in particular whether the discovery rule extended the filing deadline. We thoroughly addressed that issue in our prior opinion and concluded plaintiffs had adequately invoked the discovery rule, at least for pleading purposes. We do not repeat that analysis here because, as regards to Cushman, plaintiffs have failed to adequately state a claim, even if it was timely.

We review the sustaining of a demurrer de novo. (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 151.) "As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.] The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) We review the court's denial of plaintiffs' request for leave to amend for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The causes of action against Cushman are various forms of misrepresentation. Plaintiffs do not allege, however, that *Cushman* made any misrepresentations. Rather, Cushman is alleged to have aided, abetted, and conspired with other defendants who made the misrepresentations.

Fraud and negligent misrepresentation must be pled with particularity, with facts showing """how, when, where, to whom, and by what means the representations were tendered.""" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184; see *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, fn. 14.) Where fraud is the alleged object of a conspiracy, the claim must be pleaded with particularity. (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 210-212.) The reason for this rule

is "that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense." (*Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, superseded on another ground by Prop. 64 amending Bus. & Prof. Code, § 17204.) "The pleading of fraud . . . is also the last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings. Thus the pleading should be sufficient '"to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud."'" (*Committee On Children's Television, Inc.*, at pp. 216-217.)

"'Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' [Citations.] Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. [Citation.] 'As a general rule, one owes no duty to control the conduct of another . . . .'" (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326.) Plaintiffs must plead facts showing "actual knowledge of the specific primary wrong the defendant substantially assisted." (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145 (*Casey*).) Aiding and abetting liability "necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749.)

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By

participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) "By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Id.* at p. 511.) """The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of a common design. . . ."" (*Ibid*.) "The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582.)

"Knowledge is the crucial element" for imposing liability on parties that perform legitimate services which aid fraudulent conduct. (*Casey*, *supra*, 127 Cal.App.4th at p. 1145.) '"[S]uspicion and surmise do not constitute actual knowledge.'" (*Id.* at p. 1147.) Plaintiffs must allege Cushman "had actual knowledge of the specific wrongful act that constituted the breach of [tort] duty it purportedly aided and abetted." (*Ibid*.)

The specific wrongful act was not the payment of the $1.25 million fee out of escrow. If plaintiffs had been clearly informed of the actual way in which the transaction had been structured, there would be no arguable fraud. Rather, it was the failure of plaintiffs' representatives to disclose the extra fee.

Thus, Cushman's knowledge of the particular representations being made (and not made) to plaintiffs is the key to imposing vicarious liability. Rather than providing any factual specificity on the essential issue, however, the complaint offers no more than vague and conclusory assertions that Cushman knew about the

misrepresentations. Such "general allegation[s]" (*Casey, supra,* 127 Cal.App.4th at p. 1152) and "'kitchen sink' allegation[s]" do not sufficiently assert Cushman had actual knowledge of the fraud alleged in this case (*id.* at p. 1153). Nowhere do plaintiffs allege how Cushman acquired knowledge that, after closing the deal with BH & Sons, BH & Sons was going to conceal the marked up price from plaintiffs in a subsequent transaction. On the contrary, with regard to one of the other property transactions, plaintiffs attached an e-mail to the complaint in which the promoter defendants told the seller's brokers that the markup *would* be disclosed. While that e-mail does not pertain to the Aero Vault Property, it highlights the reality that a seller's broker would not, in the ordinary course, be informed that the *buyer's* representatives were going to deceive their clients in a subsequent transaction. It was incumbent upon plaintiffs, therefore, to plead specific facts demonstrating such knowledge. Plaintiffs failed to do so, and thus failed to adequately state claims for fraud, fraudulent concealment, and violation of section 17200 (which was based on the fraud allegations).

Schulz v. Neovi Data Corp. (2007) 152 Cal.App.4th 86 illustrates the point. There, plaintiff alleged he was the victim of an internet scam that operated an illegal lottery, which he claimed was an illegal business practice within the meaning of section 17200. (*Id.* at p. 88.) He sued four credit-card payment processors as aiders and abetters. (*Id.* at p. 90.) As to two of the payment processors, the complaint alleged they had reviewed the website, recognized it as an illegal website, but nonetheless permitted the website to display the logo of the payment processors. (*Id.* at p. 94.) The court held this allegation adequately pleaded knowledge of the tort for purposes of vicarious liability. (*Ibid.*) As to the other two payment processors, however, the complaint alleged in general terms that they knew about the illegal activity, aided and abetted it, and profited from it. (*Id.* at p. 97.) The court held these allegations were inadequate, and affirmed the trial court's ruling sustaining the demurrer without leave to amend. (*Ibid.*) Here, plaintiffs' general and conclusory allegations as to Cushman resemble the inadequate

allegations in *Schulz*. And here there is even greater reason to deem them inadequate, as, unlike *Schulz*, plaintiffs' allegations sound in fraud and thus must be pleaded with greater specificity.

The court also correctly sustained Cushman's demurrer to the negligent misrepresentation cause of action and the negligence cause of action, which simply incorporates the misrepresentation allegations. "Negligent misrepresentation is narrower than fraud. While a person can be held liable for fraud for the '[t]he suppression of a fact, by one who is bound to disclose it or who gives information of the facts which are likely to mislead for want of communication of that fact,' [citation], negligent misrepresentation requires a false statement of a past or existing material fact [citation]." (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984.) California law requires "something more than an omission" to establish negligent misrepresentation, "even as against a fiduciary." (*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 941; *id*. at p. 942 ["for a cause of action for negligent misrepresentation, clearly a representation is an essential element"].) Moreover, the lack of deceitful intent is what distinguishes negligent misrepresentation from deceit. (*Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1085.) Negligent misrepresentation is the "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (Civ. Code, § 1710, subd. (2).) Plaintiffs cannot rely on a nonsensical *vicarious* theory of liability for their negligent misrepresentation cause of action. Where the allegations are insufficiently particular to show actual knowledge of false representations being made to plaintiffs, *a fortiori*, they are insufficiently particular to show that Cushman had knowledge the untrue representations were being made without reasonable grounds for believing them to be true.

We likewise affirm the court's ruling as to plaintiffs' separately labeled causes of action for an accounting and for restitution. These purported causes of action do not allege any additional legal duties or misconduct and are properly viewed as alternative or inapplicable remedies unnecessarily listed as separate causes of action. (See *Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 661 ["there is no freestanding cause of action for restitution in California"]; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179 ["A cause of action for an accounting requires a showing that a relationship exists . . . that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting"].) Because plaintiffs have failed to otherwise plead a cause of action against Cushman, there are no grounds for an accounting or for restitution.

Finally, we review the court's refusal to provide leave to amend for an abuse of discretion; it is plaintiffs' burden "to show what facts he could plead to state a cause of action if allowed the opportunity to replead." (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890.) We find no abuse of discretion. Addressing how they would amend if given the opportunity in their appellate briefs and at oral argument in the prior appeal, plaintiffs reverted to the same generalities that are already alleged against Cushman. But a party like Cushman may not be held liable for fraud in connection with an investment transaction merely because they participated in a legitimate aspect of the transaction. Nor is it enough to suggest that Cushman could have anticipated that the "grossing up" procedure might provide an opportunity for AMC and BH & Sons to deceive plaintiffs in a subsequent transaction. Cushman, the seller's broker in a transaction not involving plaintiffs, did not have a duty to anticipate wrongdoing by some of the parties on the buyer's side of the transaction against subsequent buyer-side parties. Plaintiffs' knowledge allegations cannot rely on the notion that Cushman should have known that misrepresentations would be provided to

plaintiffs. And having given plaintiffs four opportunities to state adequate facts, the court did not abuse its discretion by refusing plaintiffs leave to amend for a fifth attempt.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs incurred on appeal.[3]

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.

[3] Appellants request for judicial notice of a grant deed filed on August 27, 2015, is denied as unnecessary to the disposition of this appeal.